Teo Kim Hui & Ors v Golden Plus Holdings Bhd and another case

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS WA-24NCC-131–03 OF 2020 AND WA-24NCC-153–04 OF 2020
AHMAD FAIRUZ J
26 FEBRUARY 2021

Companies and Corporations — Meetings — Extraordinary general meeting ('EGM') — Adjournment — Whether chairman had authority to preside over EGM — Whether the adjournments of the EGM were valid — Whether fresh special notice was required — Whether lack of statutory notice to auditor invalidated adjourned EGM — Companies Act 2016 ss 207, 266, 321(1), 322 & 582

These were consolidated applications for the court's ruling on the validity of the adjourned EGM and the adjournment thereof. The plaintiffs in OS 131/the second to the fourth defendants in OS 153 ('the conveners') who were the shareholders of Golden Plus Holdings Bhd ('the company') issued a special notice to remove directors of Golden Plus ('special notice') and a notice for an extraordinary general meeting ('EGM') dated 12 September 2019 ('notice of EGM') proposing to remove the entire board of the company and to appoint the fifth to the seventh defendants in OS 153 as the directors. The original EGM was held on 16 October 2019. However, it was adjourned by the chairman to obtain legal advice as to whether the notice of EGM may be validly issued by more than one member under s 310(b) of the Companies Act 2016 ('the Act'). Then, on 6 March 2020, the adjourned EGM proceeded as scheduled. It was initially chaired by Tan Yen Siang, who was the chairman of the original EGM. Due to objections raised from the floor as to the appropriateness of Tan Yen Siang chairing the meeting, the third plaintiff ('Tan Say Han') subsequently acted as the chairman. Taking cognisance of the point raised by the proxy of the first plaintiff that the adjourned EGM was invalidly convened due to lack of a fresh special notice of 28 days under s 322 of the Act, Tan Say Han announced the adjournment of the adjourned EGM in order to seek legal advice on the validity of the meeting. Hence, the issues that arose in OS 131 and OS 153 were: (a) whether Tan Yen Siang and Tan Say Han were exercising their authority as chairman; (b) whether the adjournments of the EGM were valid; (c) whether a fresh notice under s 322 of the Companies Act 2016 was required; and (d) whether the failure to issue a statutory notice to the auditor invalidated the adjourned EGM.

Held, allowing OS 131 and dismissing OS 153:

(1) It was trite that until a chairman was elected and quorum was met, there was no properly constituted meeting. The person chairing the meeting must be free from any doubt as to his impartiality and the ability to act fairly and without bias. If there was a reasonable and sensible possibility that a chairperson would advance his personal interest, then he should vacate the chair. This would be especially so when the resolutions to be passed and the result affected the chairperson personally. Tan Yen Siang was one of the directors facing removal as was Tan Say Han. Tan Yen Siang was entitled to declare himself as the chairman as he was previously the chairman at the original EGM and that the adjourned EGM was a continuation of the original EGM. Nevertheless, a chairman elected for a meeting could be superseded and removed by the will of the meeting (see paras 16–18).

(2) The court found that Tan Yen Siang was removed as the chairman of the meeting when the shareholders overwhelmingly voted against him acting as chairman. Hence, Tan Yen Siang no longer had the authority to preside over the adjourned EGM. The conduct of Tan Yen Siang in adjourning the meeting was highly irregular. Not only did he insisted he had authority despite being overwhelmingly removed from the chair, but his actions were also an abject disrespect of the shareholders' will. He took it upon himself to adjourn the meeting and subsequently left the meeting, without regard to the shareholders' original intention of assembling on the said day. In his haste of adjourning the meeting, the formalities of calling the meeting to order were not carried out. Such an immoderate conduct of a chairman could not be approved by any court. It would be wrong for the chairman to remove or postpone the right of the shareholders to replace the chairman and proceed with the removal of the directors, as the inherent exercise of the shareholders' right (see paras 19–22, 32 & 34).

(3) It was clear from the meeting that the shareholders in exercising their rights according to article 64 did not choose any of the directors to be the chairman of the meeting. That right given to the shareholders by majority to exercise their inherent right at a general meeting was a proprietary right given to the shareholders. They could do so in what they perceived in their best interest and no intervention would be justified simply on the premise that the commercial judgment of the majority was wrong or that they had a personal interest. As such, neither Tan Yen Siang nor Tan Say Han could had assumed chairmanship or continued as chairman of the meeting and any purported adjournment of the adjourned EGM by them would be rendered invalid. The prayers for declarations in encl 1 of OS 153 in relation to chairmanship and adjournment, namely prayers (iii), (iv), (v) and (vi) could not stand. The remaining shareholders were entitled to proceed with the adjourned EGM (see paras 41–43 & 45–46).

(4) It was clear that the meeting proceeded after both Tan Yen Sian and Tan Say Han left. The resolutions were then voted on and were carried through. The meeting which was reconvened after the departure of Tan Say Han was competent to transact business. The resolutions passed in accordance with the agenda were accordingly valid. The minutes of the said meeting officially recorded the decision of the shareholders at the meeting (see paras 47 & 49).

(5) The court was of the view that a fresh 28 days special notice was not required to be issued by the conveners to the company for the purpose of the adjourned EGM. The meeting was a continuation of the original EGM, and it was clear that the resolution requiring special notice made under s 206 of the Act was given to the company on 12 September 2019.The court found that the 12 September 2019 special notice was for all intents and purposes, the requisite notice given to the company and directors for the removal of the named directors. It was the view of the court that as at the date of the adjourned EGM, notice to carry out the resolutions to remove the directors was in excess of 100 days. Also, the agenda for the meeting remained the same. It could be concluded that the directors were aware of the resolutions to remove them. They had a preview of what was coming in the adjourned EGM. It would be wholly incredulous to argue that they were not aware of the resolutions that were to be passed at the adjourned EGM. To argue that they were entitled to a fresh 28 days notice was a mere excuse to frustrate the meeting and convenient reason to not make the representations which they could have made. The court was satisfied that there was no inadvertence on the part of the conveners when they did not issue a fresh 28 days special notice to the company. It was a conscious and deliberate decision to do so (see paras 52–54, 56–57, 61–62 & 64).

(6) The presence of an auditor in a general meeting as stated in s 266(7) of the Act concerned his capacity as an auditor. It was the view of the court that an auditor had a defined role to play. If invited to a meeting of the company, his role must relate to the business to which he is entrusted on namely the financial statements. This court found that an advertisement in the newspapers could not constitute sufficient notice given to the auditors. There was no fall back that could be relied on by the conveners in failing to send a meeting notice to the auditors. This was because, as seen in s 321 of the Act, an auditor ranks in the same category as a member and director of a company (see paras 87, 89 & 91).

(7) The court was of the view that the failure to issue a notice to the auditor in the context of the current case did not invalidate the adjourned EGM. There was nothing in the agenda that required for the presence of an auditor. Similarly, failure of the company/plaintiffs in OS 153 to demonstrate a consistent stand. The company was therefore entitled to

take the position that they could not be estopped from raising non-compliance with s 321 of the Act in this current suit despite failing to do so during the original EGM as well as in OS 569 and OS 583 which the litigation related to the same EGM. Also, there were no objections taken by any shareholders at the meeting. The court also found that there was nothing that suggested the presence of auditor was required. The auditors did not file any formal complaint or affidavit. Hence, the failure of issuing a notice to the auditor could be cured by the application of s 582 of the Act. To invalidate the meeting on this sole point would severely cause injustice to the conveners (see paras 93, 99, 102, 104, 106 & 117).

[Bahasa Malaysia summary

Ini adalah permohonan yang digabungkan untuk keputusan mahkamah mengenai kesahihan EGM yang ditangguhkan. Plaintif dalam SP 131/defendan kedua hingga keempat di dalam SP 153 ('pencelah') yang merupakan pemegang saham Golden Plus Holdings Bhd ('syarikat tersebut') telah mengeluarkan notis khas untuk memecat pengarah Golden Plus ('notis khas') dan notis untuk mesyuarat agung luar biasa ('MALB') bertarikh 12 September 2019 ('notis EGM') yang mencadangkan untuk menggantikan keseluruhan lembaga pengarah syarikat dan melantik defendan kelima hingga ketujuh di dalam SP 153 sebagai pengarah. EGM asal telah diadakan pada 16 Oktober 2019. Walau bagaimanapun, pengerusi telah menangguhkan mesyuarat tersebut untuk mendapatkan nasihat undang-undang sama ada notis MALB boleh dikeluarkan secara sah oleh lebih daripada seorang ahli di bawah s 310(b) Akta Syarikat 2016 ('Akta tersebut'). Kemudian, pada 6 Mac 2020, MALB yang ditangguhkan telah diteruskan seperti yang dijadualkan. Ia pada mulanya dipengerusikan oleh Tan Yen Siang, yang merupakan pengerusi MALB asal. Oleh kerana bantahan yang dibangkitkan mengenai kesesuaian Tan Yen Siang yang mempengerusikan mesyuarat itu, plaintif ketiga ('Tan Say Han') kemudiannya bertindak sebagai pengerusi. Menyedari perkara yang dibangkitkan oleh proksi plaintif pertama bahawa EGM yang ditangguhkan secara tidak sah kerana tidak mempunyai notis khas baru selama 28 hari di bawah Akta S 322 Akta tersebut, Tan Say Han mengumumkan penangguhan MALB yang ditangguhkan untuk mendapatkan nasihat undang-undang mengenai kesahihan mesyuarat tersebut. Oleh itu, isu-isu yang timbul dalam SP 131 dan SP 153 adalah: (a) sama ada Tan Yen Siang dan Tan Say Han telah menjalankan kuasa mereka sebagai pengerusi; (b) Sama ada penangguhan MALB adalah sah; (c) sama ada suatu notis baru di bawah s 322 Akta Syarikat 2016 diperlukan; dan (d) sama ada kegagalan untuk mengeluarkan notis statutori kepada juruaudit membatalkan MALB yang ditangguhkan tersebut.

Diputuskan, membenarkan SP 131 dan menolak SP 153:

(1) Adalah menjadi undang-undang mantap bahawa apabila sehingga

pengerusi dipilih dan korum dipenuhi, mesyuarat tidak boleh diadakan. Pengerusi mesyuarat mestilah bebas daripada sebarang keraguan mengenai keupayaan untuk bertindak secara adil dan tanpa berat sebelah. Jika terdapat kemungkinan yang munasabah dan masuk akal bahawa seorang pengerusi akan menggunakan kepentingan peribadinya, maka dia tidak boleh menjadi pengerusi. Apatah lagi resolusi-resolusi yang akan diluluskan dan hasilnya memberi kesan kepada pengerusi secara peribadi. Tan Yen Siang adalah salah seorang pengarah yang didalam proses pemecatan seperti Tan Say Han. Tan Yen Siang berhak mengisytiharkan dirinya sebagai pengerusi kerana sebelum ini beliau adalah pengerusi pada MALB asal dan MALB yang ditangguhkan adalah kesinambungan daripada MALB asal. Walau bagaimanapun, pengerusi yang dipilih untuk mesyuarat boleh digantikan dan dikosongkan melalui mesyuarat tersebut (lihat perenggan 16–18).

(2) Mahkamah ini mendapati bahawa Tan Yen Siang dipecat sebagai pengerusi mesyuarat tersebut apabila pemegang saham mengundi menentangnya yang bertindak sebagai pengerusi. Oleh itu, Tan Yen Siang tidak lagi mempunyai kuasa untuk mempengerusikan MALB yang ditangguhkan tersebut. Kelakuan Tan Yen Siang dalam menangguhkan mesyuarat tersebut sangat tidak teratur. Dia bukan sahaja menegaskan beliau mempunyai kuasa walaupun telah dipecat sebagai pengerusi, namun tindakannya juga tidak menghormati kehendak pemegang saham. Beliau mengambil keputusan sendiri untuk menangguhkan mesyuarat tersebut dan kemudian meninggalkan mesyuarat, tanpa mengambil kira permintaan pemegang saham untuk mengadakan mesyuarat pada hari tersebut. Dalam tergesa-gesa untuk menangguhkan mesyuarat itu, formaliti memanggil mesyuarat untuk memanggil mesyuarat tidak dijalankan. Perbuatan pengerusi tersebut tidak boleh diterima oleh mana-mana mahkamah. Adalah salah bagi pengerusi untuk menafikan hak pemegang saham untuk menggantikan pengerusi dan meneruskan dengan pemecatan pengarah-pengarah (lihat perenggan 19–22, 32 & 34).

(3) Adalah jelas dari mesyuarat tersebut bahawa pemegang saham dalam melaksanakan hak-hak mereka mengikut artikel 64 tidak memilih mana-mana pengarah untuk menjadi pengerusi mesyuarat. Hak yang diberikan kepada pemegang saham dengan majoriti di dalam mesyuarat agung adalah hak yang diberikan kepada pemegang saham. Mereka boleh berbuat demikian di dalam apa yang mereka anggap demi kepentingan terbaik mereka dan tiada campur tangan dibenarkan atas alasan bahawa keputusan majoriti adalah salah atau bahawa mereka mempunyai kepentingan peribadi. Oleh itu, Tan Yen Siang atau Tan Say Han tidak boleh memegang jawatan pengerusi atau terus sebagai pengerusi mesyuarat dan sebarang penangguhan MALB yang ditangguhkan oleh mereka adalah tidak sah. Prayer di dalam SP 153 berkaitan dengan

pengerusi dan penangguhan, iaitu perenggan (iii), (iv), (v) dan (vi) tidak dapat dibenarkan. Pemegang saham yang lain berhak untuk meneruskan MALB yang ditangguhkan (lihat perenggan 41–43 & 45–46).

(4) Adalah jelas bahawa mesyuarat tersebut diteruskan selepas Tan Yen Sian dan Tan Say Han meninggalkan mesyuarat tersebut. Resolusi-resolusi tersebut kemudiannya diundi dan diteruskan. Mesyuarat tersebut yang diadakan semula selepas pemergian Tan Say Han adalah sah. Resolusi yang diluluskan mengikut agenda tersebut adalah sah. Minit mesyuarat tersebut secara rasmi merekodkan keputusan pemegang saham di mesyuarat tersebut (lihat perenggan 47 & 49).

(5) Mahkamah ini berpendapat bahawa notis khas 28 hari yang baru dikeluarkan tidak perlu dikeluarkan oleh pihak pencelah bagi syarikat bagi tujuan MALB yang ditangguhkan. Mesyuarat tersebut adalah kesinambungan daripada MALB asal, dan jelas bahawa resolusi yang memerlukan notis khas yang dibuat di bawah s 206 Akta telah diberikan kepada syarikat pada 12 September 2019. Mahkamah ini mendapati bahawa notis khas 12 September 2019 adalah notis yang diperlukan yang diberikan kepada syarikat dan pengarah untuk pemecatan pengarah yang dinamakan tersebut. Mahkamah ini berpendapat bahawa pada tarikh MALB yang ditangguhkan, notis untuk melaksanakan resolusi untuk memecat pengarah adalah melebihi 100 hari. Juga, agenda untuk mesyuarat tetap sama. Adalah disimpulkan bahawa para pengarah menyedari resolusi untuk menghapuskannya. Mereka mempunyai pra-tonton apa yang akan datang dalam MALB yang ditangguhkan. Adalah tidak wajar untuk berhujah bahawa mereka tidak mengetahui resolusi yang akan diluluskan pada MALB yang ditangguhkan. Untuk berhujah bahawa mereka berhak mendapat notis 28 hari yang baru adalah semata-mata alasan untuk mengecewakan mesyuarat dan alasan mudah untuk tidak membuat representasi yang mereka boleh buat. Mahkamah berpuas hati bahawa tidak ada ketidakcekapan di pihak pihak yang berhimpun apabila mereka tidak mengeluarkan notis khas 28 hari baru kepada syarikat itu. Ia adalah keputusan yang sedar dan sengaja untuk berbuat demikian (lihat perenggan 52–54, 56–57, 61–62 & 64).

(6) Kehadiran juruaudit di dalam mesyuarat am seperti yang dinyatakan di dalam s 266(7) Akta tersebut adalah dengan kapasitinya sebagai juruaudit. Mahkamah ini berpendapat bahawa juruaudit mempunyai peranannya tersendiri. Peranannya berkaitan dengan urusan penyata kewangan. Mahkamah ini mendapati bahawa iklan di akhbar-akhbar tidak dapat membentuk notis yang mencukupi untuk juruaudit. Tiada alasan untuk gagal memberikan notis mesyuarat kepada juruaudit. Hal ini kerana menurut s 321 Akta tersebut, juruaudit berada dalam kategori yang sama sebagai ahli dan pengarah sesebuah syarikat (lihat perenggan 87, 89 & 91).

(7) Mahkamah ini berpendapat bahawa kegagalan mengeluarkan notis kepada juruaudit di dalam kes ini tidak membatalkan MALB yang ditangguhkan. Tiada di dalam agenda yang diperlukan untuk kehadiran seorang juruaudit. Begitu juga, kegagalan syarikat/plaintif dalam SP 153 menunjukkan pendirian yang konsisten. Oleh itu, syarikat berhak untuk mengambil kedudukan bahawa mereka tidak boleh diestop untuk membangkitkan ketidakpatuhan kepada s 321 Akta tersebut di dalam saman ini walaupun gagal berbuat demikian semasa MALB asal serta dalam SP 569 dan SP 583 yang dengan MALB yang sama. Selain itu, tiada bantahan yang dibuat oleh mana-mana pemegang saham dalam mesyuarat tersebut. Mahkamah juga mendapati bahawa tiada cadangan kehadiran juruaudit diperlukan. Juruaudit tidak memfailkan apa-apa aduan atau afidavit rasmi. Oleh itu, kegagalan mengeluarkan notis kepada juruaudit boleh dipulihkan dengan permohonan s 582 Akta tersebut. Untuk membatalkan mesyuarat atas alasan ini akan menyebabkan ketidakadilan kepada pencelah (lihat perenggan 93, 99, 102, 104, 106 & 117).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770, CA (refd)
Australian Continental Resources Ltd, Re (1975) 1 ACLR 405, SC (refd)
Byng v London Life Association [1989] BCLC, CA (refd)
Cheah Tham Swee & Anor v Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426, HC (distd)
Dato' Low Tuck Choy and Anor v Chong Kok Weng and Others [2009] MLJU 826; [2009] 1 LNS 964, HC (distd)
First Nominees (Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor [1983] 2 MLJ 76 (refd)
Fomento (Steriing Area) Ltd v Seisdon Fountain Pen Co Ltd [1958] 1 All ER 11, HL (refd)
Granasia Corp Bhd & Ors v Choong Wye Lin (P) & Ors and another case [2015] 1 MLJcivp 130; [2008] 4 CLJ 893, HC (distd)
HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor [2005] 1 CLJ 23, CA (distd)
Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd [2008] 3 MLJ 653; [2008] 5 CLJ 774, CA (refd)
John v Rees and others [1969] 2 All ER 274, Ch D (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49, PC (refd)
Lew Siew Moi, Datin v Ann Loong Holdings Sdn Bhd & Ors [2012] 10 MLJ 734, HC (distd)
McKerlie and another v DriHsearch Energy Ltd and Others [2009] 72 ASCR 288, SC (refd)
National Dwellings Society v Sykes [1894] 3 Ch 159, Ch D (refd)
Scalding v Lovant [1979] 3 HLC 418 (refd)

Tan Kah Wich & Ors v Datuk Phua Cheng Leong & Ors [1979] 2 MLJ 259; [1979] 1 LNS 133, FC (refd)
Teoh Peng Phe v Wan & Co [2001] 5 MLJ 149; [2001] 5 CLJ 222, HC (refd)
Than Kau & Anor v RHB Nominees (Asing) Sdn Bhd & Ors [2019] MLJU 920; [2019] 1 LNS 1271, HC (distd)
The Oriental Insurance Company Ltd v Reliance National Asia Re Pte Ltd [2008] SLR 121, CA (refd)

Legislation referred to

Companies Act [SG] s 392, 392(2)
Companies Ordinance 1962 [AU] s 366
Companies Act 1965 (repealed by Companies Act 2016) ss 128, 355
Companies Act 2016 ss 206, 207, 266, 266(1), (2), (3), (4), (5), (6), (7), 310(b), 318, 321, 321(1), 322, 322(1), 582

Michael KT Chow (Wendy Yeong with him) (Michael Chow) for the plaintiffs.
K Shanmuga (Kee Hui Yee with him) (Kanesalingam & Co) for the defendants.

Ahmad Fairuz J:

ABSTRACT

[1] This decision explains the reason why:

(a) an adjournment made by a chairman of a meeting cannot be tainted by conduct that disregards the will of the shareholders at a meeting;

(b) a fresh special notice under s 322(1) of the Companies Act 2016 ('the Act') is not required to be issued upon the reconvening of an adjourned extraordinary general meeting; and

(c) a failure to issue a notice of meeting under s 321(1) of the Act to an Auditor is an irregularity which is curable under s 582 of the Act.

BACKGROUND FACTS

The original extraordinary general meeting ('original EGM')

[2] The plaintiffs in OS No WA-24NCC-131–03 of 2020 ('OS 131')/the second to the fourth defendants in OS No WA-24NCC-153–04 of 2020 ('OS 153') ('the conveners') who are the shareholders of Golden Plus Holdings Bhd ('the company') issued a special notice to remove directors of Golden Plus ('special notice') and a notice for an extraordinary general meeting ('EGM') dated 12 September 2019 ('notice of EGM') proposing to remove the entire board of the company and to appoint the fifth to the seventh defendants in OS 153 as the directors. The original EGM was scheduled to be held on 16

October 2019 at Melia Seasons Restaurant, Kajang.

[3] The original EGM was held on 16 October 2019. However, it was adjourned by the chairman to obtain legal advice as to whether the notice of EGM may be validly issued by more than one member under s 310(b) of the Act.

[4] As a result of the adjournment, the company filed Kuala Lumpur High Court Originating Summons No WA-24NCC-569–10 of 2019 ('OS 569') while the conveners commenced Kuala Lumpur High Court Originating Summons No WA-24NCC-583–10 of 2019 ('OS 583') respectively. Both OS 569 and OS 583 were heard together by this court. On 22 January 2020, this court held, inter alia, that:

(a) the notice of EGM was validly issued by the conveners and does not contravene s 310(b) of the Act;

(b) the original EGM convened on 16 October 2019 was validly adjourned by the chairman; and

(c) any decision made by the shareholders after the adjournment was null and void.

[5] The effect of the order is that the adjournment of the original EGM was proper. The conveners could therefore revive the EGM and continue with the unfinished business of the original EGM.

The adjourned extraordinary general meeting ('adjourned EGM')

[6] Upon obtaining the ruling of this court that a meeting requisitioned under s 310(b) of the Act can be made by the conveners, a notice to convene the adjourned general meeting dated 19 February 2020 ('notice of the adjourned EGM') was issued. The adjourned EGM was scheduled to be held on 6 March 2020 at Melia Seasons Restaurant, Kajang.

(It is observed that the conveners signed the requisition on the 14 February 2020. The said requisition was served on the Board of Directors on 19 February 2020. This court will use 19 February 2020 as the date the meeting was requisitioned by the conveners.)

[7] The proposed resolutions to be passed at the adjourned EGM were the same as contained in the notice of EGM dated 12 September 2019. The resolutions sought to remove the current Board and replaced by the fifth to seventh defendants in OS 153.

[8] On 6 March 2020, the adjourned EGM proceeded as scheduled. It was initially chaired by Tan Yen Siang, who was the chairman of the original EGM. Due to objections raised from the floor as to the appropriateness of Tan Yen Siang chairing the meeting, the third plaintiff ('Tan Say Han') was subsequently acted as the chairman. Taking cognisance of the point raised by Abigail Shobana Nimbalker ('Abigail'), the proxy of the first plaintiff ('Andrew Teh') that the adjourned EGM was invalidly convened due to lack of a fresh special notice of 28 days under s 322 of the Act, Tan Say Han announced the adjournment of the adjourned EGM in order to seek legal advice on the validity of the meeting.

[9] N Sivagurunathan a/l V Narayanasamy ('Siva'), a proxy holder for Chang Chun-Pei (the daughter of the third and fourth defendants) raised the issue that the adjourned EGM was invalidly adjourned and that the meeting should be continued.

[10] Yau Ming Teck, a member, then volunteered and proposed himself to be elected as the chairman of the meeting. Thereafter, the proposed resolutions were all passed.

OS 131 and OS 153

[11] OS 131 was filed on 11 March 2020 by the conveners and OS 153 was filed on 6 April 2020 by Andrew Teh, his mother and Tan Say Han. Both sought for this court's ruling on the validity of the adjourned EGM and the adjournment thereof.

[12] In OS 131, the reliefs sought by the conveners are reproduced below:

(i) a declaration that the adjournments of the Adjourned Extraordinary General Meeting of the Defendant on 6 March 2020 by Tan Yen Siang and/or Tan Say Han were null, void, ineffective and not valid;

(ii) a declaration that the continuation of the Adjourned Extraordinary General Meeting of the Defendant on 6 March 2020 following the said invalid adjournments together with all resolutions passed thereat on 6 March 2020 was valid and binding;

(iii) a declaration that all acts of the board of directors and/or directors of the Defendant, as comprised prior to the passing of the resolutions on 6 March 2020, and taken subsequent to the passing of the resolutions on 6 March 2020, are null, void, and invalid;

(iv) a declaration that Chiew Keong On, Yapp Kiam Yen and Wong Koon Wai are the directors of the Defendant;

(v) an order that ali records, books and properties of whatsoever nature belonging or which appear to belong to the Defendant be delivered up by

A the Defendant, its directors, officers, employees, agents and/or servants to Chiew Keong On, Yapp Kiam Yen and /or Wong Koon Wai within seven (7) days from the date of service of the order to be made herein;

(vi) that the Defendant, its direction, officers, employees, agents and/or servants be ordered to take all necessary action to give effect to the B resolutions passed at the Adjourned Extraordinary General Meeting of the Defendant on 6 March 2020;

(vii) such other and/or additional relief and/or orders and/or directions that this Honourable Court deems just and appropriate including but not limited to an order under Section 582 of the Companies Act 2016 to C validate the defects, if any in the calling and convening of the Adjourned Extraordinary General Meeting of the Defendant on 6 March 2020.

[13] Meanwhile, in OS 153, the orders prayed for are, inter alia:

D (i) A declaration that the Notice of Adjourned EGM is defective, invalid, null and/or void;

(ii) A declaration that the adjourned EGM was wrongfully convened, defective, invalid, null and/or void;

E (iii) A declaration that Tan Yen Siang is the Chairman of the adjourned EGM;

(iv) A declaration that the adjourned EGM was validly adjourned by Tan Yen Siang in accordance with Article 65 of the company's Constitution;

(v) In the alternative to prayers (3) and (4) above, a declaration that the F appointment of Tan Say Han as the Chairman of the adjourned EGM is valid and/or in accordance with Article 64 of the company's Constitution;

(vi) In the alternative to prayers (3) and (4) above, a declaration that the adjourned EGM was validly adjourned by Tan Say Han in accordance with Article 65 of the company's Constitution;

G (vii) A declaration that the purported appointment of Yau Ming Teck as the Chairman of the adjourned EGM is defective, invalid, null and/or void;

(viii) A declaration that the continuation of the adjourned EGM is defective, invalid, null and/or void;

H (ix) A declaration that all resolutions purportedly passed by the members present at the adjourned EGM, subsequent to the proper and valid adjournment of the adjourned EGM by Tan Yen Siang and/or Tan Say Han, are invalid, null and/or void.

I THE ISSUES

[14] This grounds will discuss the three main issues raised during arguments by parties. The determination of the issues ultimately disposed of both applications before this court. The court directed parties to submit as if there

was only one single application. Counsel for the plaintiffs in OS 131 appropriately termed OS 153 as the counterclaim to OS 131. The issues will be discussed *seriatim.*

Issue 1: Adjournment of the adjourned EGM

Conduct of Tan Yen Siang and Tan Say Han

[15] From the minutes of the meeting, Tan Yen Siang and Tan Say Han both claimed to have had the authority to act as chairman. However, claim as they may, ultimately, the duty of this court is to examine whether they both were exercising their duty of becoming a chairman. Foremost, whether they were acting as an impartial referee to the meeting which was convened by shareholders.

[16] It is trite that until a chairman is elected and quorum is met, there is no properly constituted meeting. As opined by Loh Siew Cheang, *Corporate Powers Accountability* (3rd Ed), 'the right to preside as chairperson must be distinguished from the duties that must be discharged by a chairperson once the right to preside as chairperson has been exercised'.

[17] The person chairing the meeting must be free from any doubt as to his impartiality and the ability to act fairly and without bias. If there is a reasonable and sensible possibility that a chairperson will advance his personal interest, then he should vacate the chair. This would be especially so when the resolutions to be passed and the results thereof affect the chairperson personally. Tan Yen Siang was one of the directors facing removal as was Tan Say Han.

[18] Tan Yen Siang was entitled to declare himself as the chairman as he was previously the chairman at the original EGM and that the adjourned EGM was a continuation of the original EGM. This is consistent with the principles in *Scalding v Lovant* [1979] 3 HLC 418. Nevertheless, a chairman elected for a meeting can be superseded and removed by the will of the meeting (*The Law of Meetings — Their Conduct and Procedure* by Shaw & Smith).

[19] However, it was documented in the minutes that Tan Yen Siang was removed as the chairman of the meeting when the shareholders overwhelmingly voted against him acting as chairman. This can be seen in paras 2.26 and 2.27 of the adjourned EGM minutes. It reads as follows:

> 2.26 On that proposal, the chief administrator of attendance list of the adjourned EGM was invited to do the counting of votes (by way of show of hands) to gauge whether TYS or any director had the support of the shareholders to be the chairperson for the adjourned EGM.

A 2.27 After counting, there were 71 votes against TYS and any director present at the meeting to chair the adjourned EGM and none in favour of any director to chair.

[20] From that point onwards, it is the view of this court that Tan Yen Siang no longer had the authority to preside over the adjourned EGM. However, from the minutes of the meeting, notwithstanding his removal, Tan Yen Siang proceeded to inform the shareholders that he received two letters each from Mohd Salleh bin Lamsin, a director of the company and another shareholder, Kwa Kim Leong (whose proxy then denied such a notice was given by Kwa) informing that the 28 days special notice had not been complied with. Apart from Abigail who argued that a fresh special notice was required, no other shareholders argued that the adjourned EGM had to be adjourned for that reason. Tan Yen Siang then initiated the adjournment on the basis that he wanted to seek legal advice on the 28 days special notice issue. He then left the meeting ('the first adjournment').

[21] The conduct of Tan Yen Siang in adjourning the meeting was highly irregular. Not only did he insist he had authority despite being overwhelmingly removed from the chair, his actions were an abject disrespect of the shareholders' will. He took it upon himself to adjourn the meeting and subsequently left the meeting, without regard to the shareholders' original intention of assembling on the said day.

[22] This fuels the presumption that he was not partial and failed to act as a neutral party. The only conclusion that can be made is that he had a preconceived intention to adjourn the said meeting. In his haste of adjourning the meeting, the formalities of calling the meeting to order were not carried out. Such an immoderate conduct of a chairman cannot be approved by any court.

[23] Being the only director of the company at the meeting, Tan Say Han then foisted himself as chairman. What then transpired is best evaluated from the minutes of the adjourned EGM at paras 2.38 to 3.1. The minutes read as follows:

2.38 In view of the adjourned EGM could not put in order without the chairperson for the meeting to conduct the meeting, and the meeting was notably left with one director for the shareholders to choose to chair the meeting, the Secretary put it to the shareholders to decide on the matter.

2.39 Abigail highlighted Clause 64 on the appointment of chairman for the meeting as follows:

> ... if there is no chairman of the Board or if he shall not be present at any general meeting within fifteen (15) minutes after the time appointed for holding the same or shall be unwilling to act as chairman of any general meeting, the Members present shall choose any other Director, or if no Director is present or

if all the Directors present decline to act as the chairman of the general meeting, the Members present shall elect one (1) of their number to be chairman of the general meeting.

Pursuant to that and in this circumstance, Abigail highlighted that TSH was the only director left standing to be chosen to conduct the meeting subject to he is willing to do so, the meeting had no choice, but to choose TSH to chair the meeting.

2.40 In view of TYS, the previous EGM chairperson, had excused himself and left the meeting, and in accordance with Clause 64, TSH willingly accepted to preside over the adjourned EGM as he was the only director left to conduct the meeting.

2.41 Without ado, the chairperson called the meeting to order.

2.42 The chairperson took cognizance of the views rendered by Abigail, and his fellow director on the defective notice served on the shareholders and the board of directors.

2.43 In view that, TSH as the chairperson for the adjourned EGM adjourned the meeting in accordance with Clause 65 of the Company's Constitution for the purpose of obtaining and consulting legal opinions on the issues of defective notice served by the conveners of the adjourned EGM.

3 CONCLUSION OF MEETING

3.1 The meeting was adjourned sine die at 9.55 a.m.

[24] It can be seen from the above minutes that Tan Say Han took over as chairman upon being told that he was the only director left at the meeting. He was not chosen as required under article 64 of the Company's Constitution.

[25] From the minutes, Tan Say Han adjourned the meeting on the same basis as Tan Yen Siang ('the second adjournment').

[26] The common ground to adjourn the meeting can be seen in the respective affidavits of Tan Yen Siang and Tan Say Han where they relied on the basis that a 'complicated question of law' in respect of which the Board of the Defendant 'requires time to seek legal advice'.

[27] It must be noted that legal advisors were present at the meeting but Tan Say Han chose not to consult on the matter. Even if the argument was put by counsel of the company, Mr K Shanmuga that Tan Say Han was prevented from doing so, there was nothing from the minutes to show that Tan Say Han attempted to reach out to the legal advisor of the company.

[28] Article 127 of the Company's Constitution provides that the minutes of the meeting shall be conclusive evidence without proof of the facts stated in thereof. However, during the course of submissions, a video recording of the meeting was played to this court.

[29] The recording was consistent with the minutes of the meeting. It provided this court with a perspective of how the meeting was carried out and how the two chairmen conducted themselves before adjourning the meeting. It was helpful to enable this court to visualise the actual manner in which objections were raised by shareholders as to the suitability of Tan Yen Siang being the chairman right up to the swift manner in which Tan Say Han adjourned the meeting.

[30] It is the view of this court that the first adjournment and the second adjournment were made based on unilateral decisions to refer the purported question of law without seeking views from the floor.

[31] Due to the wanton disregard of shareholders present at the meeting, it would not be wrong to describe them as having the single-minded objective to adjourn the meeting, in breach of their role as chairman of a meeting of shareholders.

[32] The Federal Court in *Tan Kah Wich & Ors v Datuk Phua Cheng Leong & Ors* [1979] 2 MLJ 259; [1979] 1 LNS 133 held that a chairman cannot adjourn a meeting on his own will and pleasure. The following was held:

> The position at common law is that there is a power to adjourn a meeting — *Kerr v Wilkie* [1860] 1 LT 501. *This right is vested in the assembly itself unless there are particular regulations that vest this power in the chairman. In the present case, nothing in the constitution invests the President with the power to adjourn the meeting at his whim and fancy.* (Emphasis added.)

[33] Authority, duties and powers of a chairman is clearly spelt out in *The Modern Law of Meetings by Davies, Briggs, Impey, Evans and Ellis* (2nd Ed) at p 173. The duties are outlined as follows:

> 7.29 The chairman's authority is delegated to him by the company under its articles, or by that meeting by which he is appointed or by a combination of the two. Where a number of persons assemble and put a person in the chair they confer on that person by agreement the conduct of that assembled body.
>
> 7.30 The person presiding over a general meeting of members is, in the capacity as chairman of the meeting, acting as the representative of the members present at the meeting, not as the representative of the directors.
>
> 7.31 The fact that the chairman has an interest in the outcome of a decision does not, in itself, impugn the integrity of the process at a meeting. No company contemplates that the chairman will be totally disinterested in every matter, and he is presumed to act in good faith unless it is proven otherwise.
>
> 7.32 The chairman's authority, because it comes from the meeting, must be exercised to ascertain the opinion of the majority; to allow a proper discussion of the questions to be decided; and to ensure that the proceedings are conducted in accordance with the articles. He must act honestly and fairly towards all individual

interests at the meeting, and his duty is directed generally towards the best interests of the company. This means he must allow all members who wish to speak to a motion to have a reasonable opportunity to do so, even if there is clearly a majority who have already made up their minds.

7.33 It follows that it is the chairman's duty to conduct the meeting in such a way that the business is facilitated and the results of that business clearly defined. He must control and organise meetings; to preserve order so they proceed effectively; conduct the proceedings in a proper manner; and take care that the sense of the meeting is properly ascertained on any question properly before it In the absence of express provisions in the articles, 'the details of the proceedings must be regulated by the persons present and by the chairman, and if his decision is quarrelled with it must be regulate/by the majority of those presentBut where CA 2006 or the articles expressly provide for the conduct of meetings, they must be followed.

7.34 The chairman has no power to determine the matters or issues which a meeting takes into account when considering resolutions; those are matters for the whole meeting.

[34] It would be wrong for the chairman to remove or postpone the right of the shareholders to replace the chairman and proceed with the removal of the directors, being the inherent exercise of the shareholders' right. In *McKerlie and another v DriHsearch Energy Ltd and Others* [2009] 72 ASCR 288 it was held:

It would be clear abuse of power If the chairman removes or postpones the right simply because he or she (alone or in consultation with others) thinks that it would somehow be more conducive to the interest of the company if members are not allowed to exercise their right to remove directors.

[35] The role of a chairman has been described in *Shackleton on the Law and Practice of Meetings* (8th Ed) as follows:

Responsibility for the conduct of a meeting rests particularly on the chairman. He will call the speakers, regulate the length of the speeches, deal with the points of order, and control the arrangement for any vote that may be taken.

[36] The sense of the meeting must be ascertained by the chairman, apart from ensuring that proceedings are conducted properly. In *National Dwellings Society v Sykes* [1894] 3 Ch 159, Chitty J held that the duty of the chairman as:

Unquestionably it is the duty of the chairman, and his functions, to preserve order, and to take care that the proceedings are conducted properly and that the *sense of the meeting is rightly ascertained* with regard to any question which is properly before the meeting. (Emphasis added.)

[37] In *Byng v London Life Association* [1989] BCLC, the Court of Appeal in England held that in exercising powers of a chairman of a meeting of the shareholders of a public corporation, a chairman erred in law if, among other things, he did not take a decision reasonably with a view to facilitating the

purpose for which the powers had been conferred. The court held that the chairman in that case had erred in law in deciding to adjourn the meeting from morning to the afternoon because the venue to which the shareholders had first been summoned was unable to accommodate all those wishing to attend, in circumstances where many of the shareholders present in the morning were unable to rearrange their affairs on short notice so as to be present in the afternoon. Browne-Wilkinson VC had the following to say:

> In my judgment the chairman's decision must also be taken reasonably *with a view to facilitating the purpose for which the power exists.* (Emphasis added.)

[38] The Vice Chancellor further added:

> The starting point is to consider the nature of the residual power to adjourn which in my judgment remains vested in the chairman. it was a residual power exercisable only when the machine, y provided by the articles had broken down. This residual common law power is itself tightly circumscribed by reference to the objects for which it exists. I quote again from the passages which I have emphasised above in the quotations from *R v D'Oyly* [1840] 113 ER 139 and Mr Rogers's book (*Rogers A Practical Arrangement of Ecclesiastical Law* [1840]). *The power is to regulate proceedings 'so as to give aii persons entitled a reasonable opportunity of voting'. The chairman must 'do the acts necessary for those purposes'. The power to adjourn is only validly exercised if 'no injurious effect were produced'. I would add that at a company meeting a member is entitled not only to vote but also to hear and be heard in the debate. Therefore it is the very purpose of the power to facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible*. To my mind, this is inconsistent with the view that the exercise of the power can only be impugned on the grounds of lack of good faith. *In my judgment the chairman's decision must also be taken reasonably with a view to facilitating the purpose for which the power exists. Accordingly, the impact of the proposed adjournment on those seeking to attend the original meeting and the other members must be a central factor in considering the validity of the chairman's decision to adjourn.*
>
> ...
>
> *The chairman's decision will not be declared invalid unless on the facts which he knew or ought to have known he failed to take into account all the relevant factors, took into account irrelevant factors or reached a conclusion which no reasonable chairman, properly directing himself as to his duties, could have reached, ie the test is the same as that applicable on judicial review in accordance with the principles of Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 AH ER 680; [1948] 1 KB 223. *This was the approach adopted by Uthwatt J in Second Consolidated Trust Ltd v. Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567, *where he held a chairman decision invalid on the grounds that he had failed to take into account a relevant factor.* (Emphasis added.)

[39] Lord Justice Woolf went on further to state as follows:

> ... the approach of the court is no different from that which it regularly adopts when reviewing the exercise of discretion by a public body under a statutory power. *This*

is the position even though when acting as chairman of the meeting (the chairman) is not performing a public function and derives his powers either expressly or by implication from the articles of (the company). While the source of his power is different from that of a person performing a public function, the well established principles which determine whether there has been a proper exercise of discretion by a public body apply to the exercise by (the chairman) of his powers, in particular he must have regard to the nature of the power which he is exercising and use the power for the purpose for which it was given. (Emphasis added.)

[40] From the minutes of the meeting, none of the above described responsibilities were discharged by Tan Yen Siang and Tan Say Han. They were not in any manner facilitating the meeting. They failed to execute their duties reasonably consistent with the powers they held being the chair of the meeting.

[41] It is clear from the meeting too that the shareholders in exercising their rights according to article 64 did not choose any of the directors to be the chairman of the meeting (see para 2.26 of the minutes).

[42] That right given to the shareholders by majority to exercise their inherent right at a general meeting a proprietary right given to the shareholders. They can do so in what they perceived in their best interest and no intervention would be justified simply on the premise that the commercial judgment of the majority was wrong or that they had a personal interest.

[43] As such, neither Tan Yen Siang nor Tan Say Han could have assumed chairmanship or continued as chairman of the meeting and any purported adjournment of the adjourned EGM by them would be rendered invalid. In so far as Tan Say Han was concerned, the sense of the meeting was that he could not assume chairmanship as he was in 'the same boat' as Tan Yen Siang. Neither could Tan Say Han proceed to adjourn the adjourned EGM. The shareholders had already unanimously voted against any director assuming chairmanship.

[44] Clearly, the adjournment had an injurious effect. The impact of the adjournment on those seeking to attend the original meeting and the other shareholders must be a central factor in considering the validity of the chairman's decision to adjourn (see *Byng*). The adjournment had frustrated the intention of the conveners as well as the shareholders present who wanted to exercise their right as shareholders.

[45] The prayers for declarations in encl 1 of OS 153 in relation to chairmanship and adjournment, namely prayers (iii), (iv), (v) and (vi) cannot stand.

[46] In the circumstances, this court rules that the adjournments by Tan Yen Siang and Tan Say Han were invalid. It follows that the remaining shareholders were entitled to proceed with the adjourned EGM.

The resolutions carried out after the adjourned EGM continued

[47] From the minutes of the meeting recorded, it was clear that the meeting proceeded after both Tan Yen Sian and Tan Say Han left. The resolutions were then voted on and were carried through. The position in law when a meeting is reconvened is spelt out in the English Chancery Division case of *National Dwellings Society v Sykes* [1894] 3 Ch 159, where the court held as follows:

> In my opinion, he cannot, after that business has been opened, 'I will have no more to do with it; I will not let this meeting proceed; I will stop it; I declare the meeting dissolved, and I leave the chair'. In my opinion, that is not within his power. *The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it has been convenedand appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like.* (Emphasis added.)

[48] In *John v Rees and others* [1969] 2 All ER 274, the plaintiff had adjourned the meeting due to noise, disorder and some minor violence, and the court held as follows:

> *On the footing that there was no valid adjournment, it follows that, as the cases establish* (*National Dwellings Society v Sykes* [1894] 3 Ch 15*) and as counsel for the plaintiff concedes, the meeting remained in being competent to transact business. The elections conducted after the departure of the plaintiff were accordingly valid.* (Emphasis added.)

[49] The meeting which was reconvened after the departure of Tan Say Han was competent to transact business. The resolutions passed in accordance with the agenda were accordingly valid. The minutes of the said meeting officially recorded the decision of the shareholders at the meeting.

Issue 2: Whether a fresh notice under s 322 of the Act was required

[50] The second issue before this court is whether there was a need to issue a fresh 28 days special notice given that the conveners were seeking to remove the directors of the company under s 206 of the Act. Section 206 reads as follows:

> 206 Removal of directors
>
> (3) Special notice is required of a resolution to remove a director under this section or to appoint another person instead of the director at the same meeting.

[51] Section 322(1) on the other hand reads as follows:

> 322 Resolution Requiring Special Notice
>
> (1) Where special notice is required of a resolution under any provision of this Act, the resolution shall not be effective unless notice of the intention to move it has been given to the company at *least twenty eight days before the meeting at which it is moved.* (Emphasis added.)

[52] This court is of the view that a fresh 28 days special notice is not required to be issued by the conveners to the company for purposes of the adjourned EGM due to the following reasons.

The meeting was a continuation of the original EGM

[53] Given that the adjourned EGM was a continuation of the original EGM, the special notice given to the company on 12 September 2019 was still applicable and can be used for the adjourned EGM. This is consistent with the provision of article 65 of the Company's Constitution which categorically states that only business which should have been transacted at the meeting from which the adjournment took place is to be transacted. For ease of reference, article 65 is reproduced as follows:

> 65. The chairman of a general meeting may, with the consent of the Members at such general meeting at which a quorum is present (and shall if so directed by the Members as such general meeting), or in the event of disorder making the ascertainment of the wishes of the meeting impossible or for the purpose of ascertaining or resolving any point of law bearing on the validity of the meeting itself or the legality of any business of the meeting, in his discretion, adjourn such general meeting to such day and place as the Members at such general meeting or the chairman of the general meeting (as the case may be) shall determine. Whenever a meeting is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given in the same manner as in the case of any original general meeting. Save as aforesaid, no Member shall be entitled to any notice of any adjournment or of the business to be transacted at an adjourned meeting. *Except as otherwise provided by the Act, no business shall be transacted at any adjourned meeting other than the business which should have been transacted at the meeting from which the adjournment took place.* (Emphasis added.)

[54] Section 322 provides the requisite 28 days notice to be given to the company before a meeting can be held to remove the directors. To the mind of this court, it is clear that the resolution requiring special notice made under s 206 was given to the company on 12 September 2019.

[55] The resolution to remove the directors of the company was meant to be moved on the original EGM scheduled on 16 October 2019 but the

resolutions could not be carried out as the meeting was adjourned before the business of the meeting could commence.

[56] It is the finding of this court that the 12 September 2019 special notice was for all intents and purposes, the requisite notice given to the company and directors for the removal of the named directors.

[57] It is the view of this court that as at the date of the adjourned EGM, notice to carry out the resolutions to remove the directors was in excess of 100 days. There is no requirement to issue a fresh special notice under s 322 as it had been previously given to the company on 12 September 2019.

The agenda for the meeting remained the same

[58] The resolutions to be passed at the adjourned EGM as seen in the notice of the adjourned EGM dated 19 February 2020 was exactly the same as the resolutions in the notice for the original EGM. It was solely to remove the existing directors.

[59] It is therefore obvious that the adjourned EGM sought to remove the existing directors just as how the resolutions at the original EGM were. The Directors would certainly be in the know of the agenda of the adjourned EGM as they are after all, officers of the company.

[60] What can be seen from the minutes of the original EGM was that four directors sought to be removed attended the meeting per the list of attendees. They were as follows:

(a) Tan Yen Siang;

(b) Mohd Salleh bin Lamsin;

(c) Tan Say Han; and

(d) Adey bin Liun.

[61] It can be concluded that the directors were aware of the resolutions to remove them then. They had a preview of what was coming in the adjourned EGM. It would be wholly incredulous to argue that they were not aware of the resolutions that were to be passed at the adjourned EGM.

[62] To argue that they were entitled to a fresh 28 days notice is a mere excuse to frustrate the meeting am a convenient reason to not make the representations which they could have made.

Clear intention on the part of the conveners to rely on the 12 September 2019 special notice

[63] It can be seen that the notice issued to convene the adjourned EGM dated 19 February 2020 was drafted with a specific reference to the 12 September 2019 special notice. The said notice is reproduced as follows:

> NOTICE IS HEREBY GIVEN that the adjourned Extraordinary General Meeting of Golden Plus Holdings Berhad (the 'Company') will be held at Melia Seasons Restaurant, 43, Jadan Ria 1, Kawasan Perindustrian Ria, 43000 Kajang, Selangor on Friday, 6 March 2020 at 9:00 a-m for the purpose of considering and if thought fit passing with or without modifications, the following resolutions, *special notice of which (to the extent required) having been given pursuant to Sections 206 and 322 of the Companies Act 2016 on 12 September 2019.* (Emphasis added.)

[64] This court is satisfied that there was no inadvertence on the part of the conveners when they did not issue a fresh 28 days special notice to the company. It was a conscious and deliberate decision to do so. This court finds no fault on the part of the conveners for so doing. On the other hand, it was a recourse that they were entitled to carry out.

[65] What is patently clear to the mind of this court is the fact that the notice of the adjourned EGM referred to the special notice under s 322 dated 12 September 2019. Thus, any person who was in possession of the notice will know that the special notice had been given previously.

The purpose of a special notice — To enable directors to make representation

[66] A special notice is a mechanism built into the Act to enable the impacted directors the opportunity to explain to the shareholders as to why they ought not be removed. It is a natural justice process accorded the impacted directors. It is therefore, a fundamental right bestowed under s 207 of the Act. It reads as follows:

> 207 Right to be heard for directors of public company against removal
>
> (1) On receipt of special notice for a resolution to remove a director under subsection 206(3), the company shall forthwith send to the director a copy of the special notice.
>
> (2) The director shall be given the right to make oral representation or written representation not exceeding a reasonable length on the resolution to remove him.
>
> (3) Where the director makes written representation and requests the written representation be notified to the members, the company shall, unless the representation is received too late for the company to do so —

A

(a) state the fact of the representation having been made in the notice of the resolution given to members of the company; and

(b) send copy of the representation to every member the company to whom the notice of the meeting is sent.

B

(4) If a copy of the representations is not sent as required under subsection (3) due to the representations received too late by the company or due to the default of the company, the director may, without prejudice to his right to be heard orally, require that the representations shall be read out at the meeting.

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(5) Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused.

D

(6) The Court may order the company's costs on an application under subsection (5) to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

(7) The constitution of a private company may provide the rights accorded under this section to its directors.

E

[67] The Court of Appeal in *Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd* [2008] 3 MLJ 653; [2008] 5 CLJ 774; touched upon the duty of a director once he is given notice of his removal. The case was a discussion under s 128 of the Companies Act 1965 (Act 125), the predecessor to s 207 of the Act. Although the case pertains to the issue of whether the notice to remove the directors must contain reasons for seeking the removal (which the court rule to be not required), the principles on how a director reacts once notice is given to them was clearly explained. The Court of Appeal outlined the obligations of a director upon being given notice as follows:

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... Section 128 is differently constructed. It confers no security of tenure upon directors of a public company. It merely entitles such a director to 'be heard on the resolution at the meeting'. *A director is also entitled to make 'representations in writing to the company (not exceeding a reasonable length)'. He or she may also and request that the company notify its members of the representations, if for any reason the company does not send out the representations to its members the director may require his or her representations to be read out at the meeting, in addition, he or she may also orally address the meeting.* In our judgment the pronouncement in Kanda applies in the domain of public law.

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It does not apply in the private law sphere, particularly to a resolution that seeks the removal of a director of a company in general meeting. To hold otherwise would be to equate s 128 of the Act with art 135(2) of the Federal Constitution and the proceedings of a company in general meeting to a hearing before a tribunal trying a member of the public service charged with a disciplinary offence. Ail that a resolution contemplated by s 128 of the Act need do is to set out the proposal to remove one or directors of the company. *The notice requirement in s 128 sufficiently*

I

meets the element of fairness as it makes the director concerned aware of the fact that there is a proposal to remove him or her. It is then up to the director concerned to prepare representations setting out the reasons why he or she should not be removed, e.g., because he or she has always acted in the best interests of the company. He or she may then attend the general meeting and make an oral address answering his or her critics, if any. This, then, is the content of the rules of natural justice in the context and circumstances encapsulated in s 128 *of the Act.* The setting out of the grounds for proposing the removal is not a requirement of s 128 ... (Emphasis added.)

[68] From the minutes of the meeting, it was observed that the impacted directors did not make any formal representations in response to the resolution either at the original EGM or the adjourned EGM. At the adjourned EGM, the inaction was due to their overly naive contention that the unlawfully convened due to the failure of issuing a fresh special notice. It is the view of this court that the directors cannot be rewarded for their presumptuous belief. It was a risk that they took knowing fully well the grave ramifications.

[69] As a recap, Mohd Salleh bin Lamsin merely conveyed his views via Tan Yen Siang. Even then, it was not a representation but a mere letter claiming that he was entitled to the 28 days notice period. Andrew Teh too did the same thing via his proxy, Abigail. Both contended that they were entitled to more time. They therefore, contended that the adjourned EGM was invalid for failure to adhere to the 28 days special notice.

[70] It was obvious that the meeting was not informed of any representations by the named directors sought to be removed. Again, the logical deduction was that no such attempts were made by the impacted directors to address their removal. No reasons were given as the reason for needing the additional time. It can be summed up that they never intended to make any representations.

[71] The failure of the directors to make the representations is a breach of s 207 of the Act. This simply means that the impacted directors had waived their right to challenge the resolution. They had technically waived their entitlement to be heard as why the resolutions should not be moved and carried out.

[72] If they were sincere in wanting to defend themselves, they would have attended the adjourned EGM. However, as directors, they chose not to attend. It boggles the mind of this court on why such a stand was taken. The proposed resolutions were to remove them from the company and yet they chose not to attend and offer their representation. Their actions reek malice in wanting to deny the will of the majority, an eventuality which they could not avoid if the resolutions were put to vote.

[73] It is the observation of this court that such brazen attitude was fuelled by their intent to frustrate the meeting. It was a synchronised decision taken by all the directors to send messages through their intermediaries to the meeting expressing their view that the meeting was invalidly convened due to a breach of ss 206 and 322 of the Act.

[74] A long list of cases were produced by counsel for the plaintiff in OS 153 to highlight the point that a failure to issue a 28 days special notice was fatal to the removal of the directors. The cases included *Granasia Corp Bhd & Ors v Choong Wye Lin (P) & Ors and another case* [2015] 1 MLJcivp 130; [2008] 4 CLJ 893; *HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor* [2005] 1 CLJ 23; *Than Kau & Anor v RHB Nominees (Asing) Sdn Bhd & Ors* [2019] MLJU 920; [2019] 1 LNS 1271; *Lew Siew Moi, Datin v Ann Loong Holdings Sdn Bhd & Ors* [2012] 10 MLJ 734; *Dato' Low Tuck Choy and Anor v Chong Kok Weng and Others* [2009] MLJU 826; [2009] 1 LNS 964; *Cheah Tham Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426. With respect, the cases above among others, discusses the failure to serve the statutory 28 days special notice to either one or more of the relevant directors.

[75] It is the view of this court that the above cases are distinguishable on the facts. Foremost is that the adjourned EGM was a continuation of the original EGM. At the risk of repetition, Article 65 of the Company's Constitution provides 'no business shaii be transacted at any adjourned meeting other than the business which should have been transacted as the originai meetingBy way of emphasis, s 207 provides that 'On receipt of a speciai notice for a resolution to remove a director under section 206(3), the company shall forthwith send to the director a copy of the special notice'. Clearly, the current case is a continuation of an unfinished business which all formalities had been complied with at the original EGM.

[76] It cannot escape the observations of this court that there was no issues raised as to the compliance by the plaintiffs in respect of s 206 at the original EGM. On the contrary, it was not disputed that such a notice was indeed given. In fact, at Original EGM on 16 October 2019, none of the directors present namely Tan Yen Siang, Mohd Salleh bin Lamsin, Tan Say Han and Adey bin Liun wanted to make any representation. The test of eligibility should have been taken at the original EGM and not the adjourned EGM.

[77] Counsel for the eighth defendant in OS 153, Mr S, Suhendran argued that the notice must be freshly served by virtue of s 318 of the Act. It was contended that the notice of the business of the meeting ie the removal of the directors must be given. The failure to give notice of the 'business' of the meeting was therefore fatal to the conveners. Reference was also made to article 65 of the Company's Constitution.

[78] This court does not disagree with the contention made by counsel. However, the special notice under s 322 is not a notice of a meeting. Instead, it is purely a special notice to carry out a specific resolution where the said resolution (resolution for the removal of the directors) would require a 28 days notice to be given. There is a reason for the requirement of such a notice. The primary reason being the need to provide the relevant notice to the impacted directors (see *Indian Corridor*). Section 207 is the right to be heard for directors against the proposed removal.

[79] A notice of meeting was issued by the conveners when they issued the notice of the adjourned EGM dated 19 February 2020. Therefore, a notice of meeting under s 318 and a special notice under s 322 are distinct provisions under the Act and is not dependant on one another.

[80] For the aforesaid reasons mentioned, this court finds the argument by the company and the plaintiffs in OS 153 to be without merit.

Issue 3: Notice to the auditor

[81] It was contended fervently that the notice to the auditor was a statutory requirement under s 321 and failure to issue such a notice invalidated the adjourned EGM. Mr. Lee Shih in exhibiting his usual clarity, brought to the attention of this court the provisions under s 266 of the Act. He explained at length the reasons why an auditor must be included in a meeting each time one is called for. This court takes no exception to the erudite submissions of counsel. In fact, it was a good overview of the role and powers of an auditor.

[82] The said submissions were consonant with the principles outlined in *Fomento (Steriing Area) Ltd v Seisdon Fountain Pen Co Ltd* [1958] 1 All ER 11, where Lord Denning described the function of an auditor as follows:

> What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations, and that it is no part of his function to inquire whether an article is covered by patents or not I think this is too narrow a view. *An auditor is not to be confined to the mechanics of checking vouchers and making arithmetic computations. He is not to be written off as a professional 'adder-upper and subtractor'. His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform his task properly, he must come to it with an inquiring mind - not suspicious of dishonestly, I agree — but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none.* (Emphasis added.)

[83] In *Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149; [2001] 5 CLJ 222, Kang Hwee Gee J (as he then was) had occasion to set out such duties in the

following terms (at p 235):

> *The auditor is a compulsory fixture of the company. Under s 172 of the Companies Act 1965 he must be appointed within three months of incorporation by the directors and thereafter has to be appointed at every AGM. He is the watchdog of the company and to quote Walter Woon the author of Company Law (2nd Ed): 'If he smells a rat, he must bark'* (Emphasis added.)

[84] It bears no iteration that the powers of an auditor are undisputedly vast. However, the scheme of s 266 focuses on the function of an auditor vis a vis the financial statements of the company. This can be seen in s 266(1)–(6) of the Act.

[85] The right to be invited to a meeting of the company is found under s 321 of the Act where it reads as:

> *(1) Notice of a meeting of members shall be given to every member, director and auditor of the company.*(Emphasis added.)

[86] The entitlement of an auditor to attend a general meeting and the role he plays was further refined in s 266(7) where it reads as follows:

> (7) An auditor of a company or his agent authorized by him in writing is entitled to attend any general meeting of the company and to receive all notices ofand other communications relating, to any general meeting which a member is entitled to receive, *and to be heard at any general meeting which he attends on any part of the business of the meeting which concerns the auditor in his capacity as auditor.* (Emphasis added.)

[87] It is clear that the presence of an auditor in a general meeting as stated in s 266(7) concerns his capacity as an auditor.

[88] The auditor's role in meetings is also recognised in the company's articles of association in particular at article 135. It reads as follows:

> The auditor or auditors of the Company shall be entitled to attend any general meeting of the Company and to receive all notices of and other communications relating to any general meeting of the Company which any Member is entitled to receive, and to *be heard at any general meeting on any part of the business of the meeting which concerns him as auditor.* (Emphasis added.)

[89] It is the view of this court that an auditor has a defined role to play. If invited to a meeting of the company, his role must relate to the business to which he is entrusted on namely the financial statements.

[90] In the context of the current case, the crucial question that needs to be answered by this court is whether the lack of an express notice to the auditors would nullify and invalidate the adjourned EGM of 6 March 2020.

[91] While counsel for the conveners, Mr Michael Chow with conviction, argued that there was sufficient notice given by the advertisement taken by the company in the newspapers, this court however finds that an advertisement cannot constitute sufficient notice given to the auditors. There is no fall back that can be relied on by the conveners in failing to send a meeting notice to the auditors. This is because, as seen in s 321 of the Act, an auditor ranks in the same category as a member and director of a company.

[92] The issue is whether in the current case and the context of the proposed resolutions, the failure to do so invalidated the adjourned EGM.

[93] It is the view of this court that failure to issue a notice to the auditor in the context of the current case did not invalidate the adjourned EGM. This court reasons as follows.

There was nothing in the agenda that required for the presence of an auditor

[94] As seen from the notice of the adjournment EGM dated 19 February 2020, the resolutions proposed to be passed had nothing to do with any duties that require the presence of an auditor. It was purely a meeting called to pass the 12 resolutions namely for the removal of the directors. No reference to any financial statements was made in the said notice of meeting. On hindsight, even if an auditor was invited, he or she will have no role to play.

[95] It is for this reason that this court is persuaded by the arguments of counsel for the conveners that no objection was taken in the original EGM because the meeting did not relate to any duties of an auditor.

[96] In a highly charged confrontation between shareholders, it is the view of the court that the intention of shareholders must be carefully scrutinised. It is clear that the conveners were contending that they had the relevant number of shares to procure the ouster of the existing directors. This was demonstrated by virtue of the number of shares they collectively held which not only entitled them to convene a meeting under s 310(b) of the Act but also to successfully pass the resolutions proposed on 6 March 2020.

[97] As a court sitting as an impartial arbitrator, it cannot allow a box-ticking exercise to overshadow the intent of shareholders. What more when the purported non-compliance was raised after the fact and not

A contemporaneously at either of the meetings. To allow such a perfunctory application of the law would defeat the overriding right of shareholders who were exercising their statutory rights.

B **[98]** Upon a careful balancing exercise undertaken by this court, the scale of fairness must tip in favour of the conveners.

Failure of the company/plaintiffs in OS 153 to demonstrate a consistent stand

C **[99]** The law is clear in law that estoppel does not operate against a statutory provision/requirement. Reliance was placed by the company on the case of *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49. This court accepts this proposition. The company was therefore entitled to take the position that they cannot be estopped from raising non-compliance with s 321 in this D current suit despite failing to do so during the original EGM as well as in OS 569 and OS 583 (the 's 310(b) challenge'), which litigation related to the same EGM.

E **[100]** It is therefore accepted as a fact that in OS 569 and OS 583, no such objections were raised despite extensive arguments on the validity of calling the original EGM. It could very well be the case that the company did not think the issue was important then or they could reserve such an argument for another day. Such a stand baffles this court as in the current case, it is one of the main F arguments put up to challenge the validity of the meeting. The law as it stood during the s 310(b) challenge was the same as it is today. It is not a new provision recently introduced.

G **[101]** It is for the abovementioned reasons that this court is of the view that there must be a demonstration of a genuine need for the presence of the auditors. It must be made at the earliest possible opportunity. Failure to do so would inevitably invite a suggestion that the need for an auditor at the meeting was an afterthought. The inconsistent approach of the company/plaintiffs in OS 153 does not aid them in defending the argument that there was a genuine H need for auditors to be present at the adjourned EGM.

There were no objections taken by any shareholders at the meeting

I **[102]** From the minutes of the meeting, it was clear that the shareholders debated heavily on the issue of the special notice. If indeed the role of an auditor was crucial to the meeting, a mention of the lack of notice to the auditors would at least have been made. However, nothing about notice to the auditors was raised at the meeting.

[103] This fuels the suspicion that the presence of an auditor at the meeting was not necessary. Only upon preparing for the challenge before this court that the need for a notice to the auditors became important.

There was nothing before this court that suggested the presence of auditor was required. The auditors did not file any formal complaint or affidavit

[104] The affidavits of the company in OS 131 and the plaintiffs in OS 153 did not state any reason as to why an auditor was needed at the meeting. What was even more perplexing is the failure of the auditor of the company themselves to file any affidavits complaining about the non-service of the notice.

[105] Given that it was the plaintiffs in OS 153 who argued that the presence of an auditor was crucial, at the very least there must be some explanation as to what role the auditors would play at the said meeting and in which part of the business of the meeting concerns the auditor. This is consistent with article 135 of the company's articles of association. Unfortunately, nothing was shown in the affidavits of the company or the plaintiffs in OS 153.

The failure of issuing a notice to the auditor can be cured by the application of s 582 of the Act

[106] The curative provision for any defect, irregularity, or deficiency of notice is found in s 582 of the Act. It reads as follows:

> (1) *No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused* which cannot be remedied by any order of the Court.
>
> (2) The Court may, if it thinks fit, make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency. (Emphasis added.)

[107] A read of the provision would suggest that there is a presumption of validity in that the default position in law is that no proceeding is invalid because of any defect, irregularity, or deficiency unless the court is satisfied that substantial injustice has been caused.

[108] The onus lies with the party complaining that the irregularity has caused substantial injustice and it cannot be cured by any other order of the court. It must be shown that there is a nexus between the procedural irregularity that has occurred and the matters of prejudice relied upon as constituting injustice.

[109] The Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770 held that the application of s 355 of the Companies Act 1965 (the equipollent provision to s 582 of the Act) is an exercise of discretion by the court.

[110] A similar provision to s 582 can be found in s 392 of the Singapore Companies Act. At s 392(2) of the Singapore Act, it reads:

> 392(2) A proceeding under this Act is not invalidated by reason of any procedural irregularity *unless the court is of the view that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the court* and by order declares the proceedings to be invalid. (Emphasis added.)

[111] It can be seen that there Is a similar presumption of validity. Walter Woon in *Woon's Corporation Law* (Lexis Nexis, 2019) was of the view that the burden lies with the party alleging substantial injustice to demonstrate why such an irregularity can invalidate a proceeding. It does not lie with the persons seeking to uphold the proceedings or meetings.

[112] The key consideration for the court, in the exercise of its discretion, is to ensure that any validation order would not result in injustice to the company or any of its shareholders or creditors. As to what constitutes injustice for the purposes of this section, reference is made to the case of *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405. In explaining the application of s 366 of the Australian Companies Ordinance 1962, which is in *pari materia* with s 355 of the Companies Act 1965 and very similar to s 582 of the Companies Act 2016, Blackburn J held:

> Some argument occurred on the connotation of the word 'injustice' in this paragraph. In my opinion it necessarily implies a consideration of the relative gains or losses of the parties involved. Counsel for the respondents sought to persuade me that in effect the word 'injustice' meant 'loss'. The word 'prejudice' was the one he actually used in argument, and I use it here in the sense of loss' or 'harm'. The gist of his argument was that if the order proposed would cause prejudice to the company, member, or creditor in question, that in itself was enough to preclude the making of the order, without regard to the effect of the order upon the rights of any other party. *I think this construction is incorrect, and that it would make the section far less useful. In my opinion the task of the Court, in complying with paragraph (e), will not be complete merely upon its satisfying itself that the order proposed would not cause prejudice (in the sense indicated) to any person of the classes mentioned. Such an order may well do so. Prejudice is not the criterion; justice is; and justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made.* (Emphasis added.)

[113] The dicta of Blackburn J in *Re Australian Continental Resources Ltd* has been consistently approved and adopted by the Malaysian and Singaporean

courts. In *Aik Ming (M) Sdn Bhd & Ors,* the Court of Appeal held, in relation to s 355 of the Companies Act 1965:

> Now it is clear that *the section looks to the justice of a particular* case: it is *not concerned with the question whether prejudice* would result in the making of a validation order. (See *Re Australian Continential Resources Ltd* (1975) 1 ACLR 405). (Emphasis added.)

[114] In *The Oriental Insurance Company Ltd v Reliance National Asia Re Pte Ltd* [2008] SLR 121 (CA) the Court of Appeal in Singapore held that it must refer to something greater than just ordinary prejudice (see also *First Nominees (Pte) Ltd v New Kok Ann Realty Sdn Bhd & Anor* [1983] 2 MLJ 76).

[115] It follows therefore that a consideration of justice in this case cannot be limited to the defendant's claim that the auditors had been deprived of attending the meeting.

[116] Here, the resolutions in question were passed by a majority of the shareholders. The resolutions had nothing to do with the duties and auditor's business. Indeed, there is no complaint by the auditors that the resolutions would prejudice them let alone cause any injustice of any manner. The prejudice or injustice if at all, is not grounded on any basis.

[117] To invalidate the meeting on this sole point would severely cause injustice to the conveners. The scales of justice would therefore tilt towards this court exercising its discretion in ruling that the failure to issue the relevant notice to the auditors to be appropriately cured by the application of s 582 of the Act.

CONCLUSION

[118] It is clear to the mind of this court that the conveners have followed the procedures outlined under the law. In the foregoing, this court rules that OS 131 is allowed and all the prayers therein are granted. It follows that OS 153 is dismissed.

Order accordingly.

Reported by Muhamad Azham Marwan